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In the Supreme Court of the United States

OCTOBER TERM, 1982

CABLEVISION SYSTEMS DEVELOPMENT COMPANY AND ATLANTIC CABLE TELEVISION SERVICES CORPORATION, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly found that an employer that recaptured work previously done by a subcontractor was a successor-employer where it hired the subcontractor's employees and the bargaining unit remained unchanged.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-81

CABLEVISION SYSTEMS DEVELOPMENT COMPANY AND ATLANTIC CABLE TELEVISION SERVICES CORPORATION, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-7a) is reported at 671 F.2d 737. The decision and order of the National Labor Relations Board (Pet. App. 8a-9a) are reported at 251 N.L.R.B. 1319.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1982. A petition for rehearing was denied on April 19, 1982 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on July 15, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant portions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2.

STATEMENT

1. Petitioner Cablevision operates a cable television service in New York and New Jersey. Prior to July 1977, Cablevision subcontracted the installation of cables and receiver units at its Long Island customers' premises and the maintenance of that equipment to Broadway Maintenance Corp. (Broadway) (Pet. App 12a). Broadway's maintenance and installation employees were represented by respondent International Brotherhood of Electrical Workers Local 25 (the Union) (*id.* at 13a).

On June 30, 1977, Cablevision terminated its contract with Broadway and, on July 1, began performing the previously subcontracted installation and maintenance functions through a wholly-owned subsidiary, petitioner Atlantic Cable Television Services[1] (Pet. App. 13a, 14a). Forty-eight of the 53 employees employed by Cablevision to perform the previously contracted work had been employed by Broadway (*id.* at 20a). They performed the same work for Cablevision as they had for Broadway with no hiatus in their employment (*ibid.*).

The Union requested that Cablevision bargain with it on behalf of the installation and maintenance employees. Negotiations between Cablevision and the Union were held, but they broke down and Cablevision refused to meet further, contending that it had no obligation to bargain with the Union. Pet. App. 5a, 30a-33a.

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[1] The Board found (Pet. App. 12a) Cablevision and Atlantic to be a single integrated employer, a finding admitted by petitioners. Both petitioners are referred to herein as Cablevision.

2. The Board found that Cablevision violated Sections 8(a)(5) and 8(a)(1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union as the representative of the installation and maintenance employees. In reaching this conclusion, the Board found that Cablevision was a successor employer of the Broadway employees and therefore was obligated to bargain with the Broadway employees' bargaining representative (Pet. App. 30a).[2] The Board relied on the facts that Cablevision "has recaptured from its subcontractor the functions of installation and servicing of its cable television business. There was no hiatus whatsoever * * *. The employees taken over from Broadway continued to do the same work that they had been doing before, and were supervised by the same supervisors" (Pet. App. 29a).[3]

3. The court of appeals agreed with the Board that Cablevision was Broadway's successor, observing that (Pet. App. 6a):

> It is difficult to imagine a clearer case of the application of the successorship doctrine than the present one, where the change of employer represents merely a recapture of an operation previously performed by an independent contractor. The great bulk of Atlantic's employees was carried over

[2] Alternatively, the Board held that Cablevision recognized the Union voluntarily when it engaged in negotiations and then unlawfully withdrew recognition (Pet. App. 33a). The court of appeals did not reach this alternative holding and no issue regarding it is raised here.

[3] The Board rejected the contention that Cablevision cross-trained the employees to perform a greater variety of work than they had performed at Broadway, noting that initially the employees performed exactly the same work as at Broadway and their subsequent training involved "additional duties [that] were not essentially different [nor] required a greater knowledge or different skills" (Pet. App. 29a-30a).

from Broadway, and the former Broadway employees continued to perform basically the same work as before.

The court rejected Cablevision's contention that the successorship doctrine established in *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 278-279 (1972), should not be applied here because Broadway and Cablevision were not in the same business. In this regard, the court explained that "the relevant comparison is not between Cablevision and Broadway on a total basis, but between the specific operations involving the union members" (Pet. App. 7a).

ARGUMENT

In *NLRB* v. *Burns International Security Services, Inc.*, *supra*, this Court held (406 U.S. at 281) that where, after a new employer takes over an operation from a predecessor employer, "the bargaining unit remains unchanged and a majority of the employees hired by the new employer" have been represented by a union, the new employer is obligated to bargain with that union. Cablevision does not dispute that the bargaining unit here remained the same or that it hired a majority of the predecessor's employees. Rather, it maintains that it should not be deemed a successor-employer solely because its predecessor performed only service and maintenance cable television functions while it offers an integrated cable service. There is no merit to that contention.

The fact that Cablevision performs an integrated service while Broadway performed a limited service[4] is relevant to determining whether Cablevision is a suc-

[4] Cablevision's assertion (Pet. 6) that it and Broadway operate in different industries is not accurate: both operated in the cable industry; Broadway, however, operated in that industry in a more limited capacity than Cablevision does.

cessor to Broadway. However, as the court of appeals correctly noted (Pet. App. 7a), the relevance is to "whether operations, as they impinge on union members, remain essentially the same after the transfer to the new employer." Accord: *International Union of Electrical, Radio & Machine Workers* v. *NLRB*, 604 F.2d 689, 694 (D.C. Cir. 1979). In other words, where the change from a limited to an integrated operation causes alterations in the bargaining unit so that the new bargaining unit may no longer be an appropriate one, successorship status will not be found. *NLRB* v. *Burns International Security Services, Inc.*, *supra*, 406 U.S. at 280. Here, the fact that Cablevision is an integrated operation had no impact on the bargaining unit. The bargaining unit employees were not integrated into any other Cablevision operation but were maintained as a separate unit doing the same work under the same supervision. In those circumstances, the fact that Cablevision engages in other operations besides installation and maintenance does not preclude a finding of successorship.

The cases relied on by Cablevision (Pet. 5-6) stand for no different proposition. In *NLRB* v. *Middleboro Fire Apparatus, Inc.*, 590 F.2d 4, 6-7 (1st Cir. 1978), the predecessor employer manufactured firefighting apparatus and also operated a service department. The successor-employer took over only the service department. Despite this change from an integrated operation to a limited one, the court found (*id.* at 8-9) that the new employer was a successor as defined by *Burns*. The only difference between that case and this one is that there the successor rather than the predecessor carried on the more limited operations. In neither case does the change in scope of operation control on the question of successorship status.

In *NLRB* v. *Bausch & Lomb, Inc.*, 526 F.2d 817, 825-826 (2d Cir. 1975), the court rejected a finding that an employer who purchased a building was a successor

to the previous owner's bargaining obligation to the union representing its four boiler room employees. The court asserted that because the new owner operated a "completely different business" it was "unclear" whether the boiler room employees constituted an appropriate unit or should properly be placed in either a multiplant or a wider production unit. No such impact on the appropriateness of the bargaining unit was shown to have occurred here as a result of Cablevision's status as an integrated operation.

Similarly, in *International Association of Machinists, District Lodge 94* v. *NLRB*, 414 F.2d 1135 (D.C. Cir. 1969) (IAM), the court agreed with the Board that two new employers who purchased automobile dealerships from General Motors did not succeed to the latter's bargaining obligation with the unions that represented certain of its employees in a single unit covering the two dealerships. The court found (*id.* at 1137-1138) that a single unit was no longer appropriate after the sale to the two employers who were competitors.[5]

The decision in *NLRB* v. *Alamo White Truck Service*, 273 F.2d 238 (5th Cir. 1959) also preceded *Burns*. There the Court found that changes in organizational structure occasioned by a change in ownership from a large national concern to a small local concern resulted in changes in the relationship between management and the bargaining unit (*id.* at 242). No such changes were shown here. Moreover, in *Alamo* the court also relied on the fact that none of the new employer's unit employees belonged to the union (*id.* at 241).

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[5] Moreover, the new employers in *IAM* did not hire a majority of the predecessor's employees (*id.* at 1137). *IAM* was decided prior to *Burns*, and that factor was not considered dispositive by the Board or the court (*id.* at 1138).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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